

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

FEB 24 2016

OFFICE OF
MANAGING DIRECTOR

Lawrence Rogow, Chairman
Venture Technologies Group, LLC
5670 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90036

Licensee/Applicant: **Venture Technologies Group, LLC**

Waiver and Refund of Regulatory Fees

Disposition: **Dismissed and Denied** (47 U.S.C. § 159(d); 47 C.F.R. §§ 0.401, 1.3, 1.7, 1.1160, and 1.1166)

Station: WNYA, Facility ID 136751

Fee: Fiscal Year (FY) 2012 Regulatory Fees

Date Request Submitted: Jun. 7, 2013

Date Regulatory Fees Paid: Sep. 6, 2012

Fee Control No.: RROG-12-00015266

Dear Mr. Rogow:

This responds to Licensee's *Request*¹ for a partial refund of its 2012 regulatory fees paid for station WNYA, Pittsfield, MA, which is located in the Albany-Schenectady-Troy DMA, but, as Licensee asserts, because it lacks a network affiliation, its coverage area is smaller than the DMA, and it is physically located in Massachusetts, where the county population foretells a market size smaller than the San Angelo, TX, DMA, Licensee should pay a reduced fee comparable to that smaller DMA market. As we explain below, Licensee's submission fails to comply with the Commission's filing procedures, we dismiss, and, in the alternative, Licensee fails to demonstrate that the fee paid is excessive or to demonstrate that the Commission should waive or reduce the total fee, hence we deny the *Request*.

¹ Letter from Lawrence Rogow, Chairman, Venture Technologies Group, LLC, 5670 Wilshire Boulevards, Suite 1300, Los Angeles, CA 90036 to Federal Communications Commission, Office of the Managing Director, FCC, 455 12th St., S.W., Rm 1-A625, Washington, DC 20554, Attn: Regulatory Fee Waiver/Reduction Request (Jun. 7, 2013) (*Request*) with Attachment A (Fee Filer, Report for Submitted Fees, 9/6/2012), Attachment B (Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, FCC to Venture Technologies Group, LLC, c/o Joan Stewart, Esq., Wiley Rein LLP, 1776 K St., NW, Washington, DC 20006 and WNYT-TV, LLC, c/o Charles R. Naftalin, Esq., Holland & Knight LLP, 800 17th St., NW, Ste 100, Washington, DC 20006 (May 29, 2013), Attachment C (Albany-Schenectady-Troy, NY Demographic and Economic Summary), Attachment D (San Angelo, TX Demographic and Economic Summary). Licensee's submission to the Office of the Managing Director, Room 1-A625, does not comply with the Commission's rule requiring filing with the Commission's Secretary (47 C.F.R. § 1.1166(a)(2)).

Background

On June 7, 2013, Licensee submitted to the Commission's Office of the Managing Director its *Request* asserting, in relevant part, that it "is the licensee of WNYA in Pittsfield, MA[, and it] requests a partial refund of its regulatory fee [because (a) it] was granted a failing station waiver [permitting Licensee to assign its license to WNYT-TV, which is the owner of a second full-power television station in the same DMA], (b) it does not have any network affiliation[, (c) its coverage area of] 25,867 square kilometers of the Albany-Schenectady-Troy DMA" is 22,421 square kilometers smaller than "the biggest station" in the same DMA, (d) its "operation and market identification is on channel 51 and therefore should continue to be in the UHF TV band for purpose of regulatory fee assessment," and (e) it is "licensed in Pittsfield, Berkshire County, Massachusetts ... that is not located in the New York State and [Licensee's station] is the only station in the Albany-Schenectady-Troy DMA that is not licensed to a city within the metropolitan area."² Moreover, the population of Berkshire County is "10% of the population of the entire Albany-Schenectady-Troy DMA. ... With only an estimated 53,385 television households within Berkshire County ... this is equivalent to a market smaller than San Angelo, TX, DMA," hence Licensee should pay a reduced fee comparable to a smaller DMA market. Licensee believes that circumstances dictate that its regulatory fee be adjusted in accordance with Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12763, ¶¶ 21-22.³

Standards

The Commission's rules include well established procedures for assessing and collecting annual regulatory fees, the consequences for failing to make timely complete payment, the procedures for submitting petitions to defer payment and to petition for waivers, reductions, and refunds, and procedures for filing.⁴ Licensees are expected to know these rules and procedures,⁵ and the consequences for non-compliance.

The 1994 *MO&O*, relied on by Licensee, discusses then-relevant circumstances upon which a licensee may apply for a reduction of its regulatory fee. Specifically, the 1994 *MO&O*, provides that a licensee of a UHF station, lacking network affiliation, operating in a large market, not providing a signal to a substantial portion of DMA, and not carried by cable systems serving the DMA principal metropolitan areas, may apply to the Managing Director for a reduction of the fee. Thereafter, the Managing Director, under delegated authority, will determine if the station with these characteristics demonstrates it should be charged a fee "based on the number of television households served, and it will be charged the same fee as stations serving markets with the same number of television households" using information derived from "the Arbitron [now A.C. Nielsen] market data in the [Nielsen Station Index Directory and Nielsen Station

² *Request* at 1-2.

³ *Id.* at 2.

⁴ 47 C.F.R. § 1.1166; see 47 C.F.R. Part 1, Subpart G.

⁵ 47 C.F.R. § 0.406; see *Life on the Way Communications, Inc., Forfeiture Order* 30 FCC Rcd 2603, 2607 (2015).

Index US Television Household Estimates or any successor publications].⁶ These characteristics have changed.

Relevant to annual regulatory fees, section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, codified at 47 U.S.C. § 534, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.⁷

The Commission's rule at 47 C.F.R. § 1.1160(a) provides that a refund of regulatory fees will be made upon request, only in the following instances:

- (1) When no regulatory fee is required or an excessive fee has been paid. In the case of an overpayment, the refund amount will be based on the applicants', permittees', or licensees' entire submission. * * *
- (2) * * *
- (3) When a waiver is granted in accordance with §1.1166.
* * *
- (d) No refunds will be processed without a written request from the applicant, permittee, licensee or agent.

Under 47 C.F.R. § 1.1166,

The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. ... (a) ... All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission. ... (2) If no fee payment is submitted, the request should be filed with the Commission's Secretary.

⁶ Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12763, ¶¶ 21-22 (1995) (1994 MO&O); Assessment and Collection of Regulatory Fees for Fiscal Year 1996, *Report and Order*, 11 FCC Rcd 18774, 18786, ¶ 32 (1996) ("We ... rely on Nielsen's DMA market rankings ... Nielsen data is generally accepted throughout the industry and will be updated and published annually ... We will consider the equities concerning the fees of licensees that change markets on a case-by-case basis, upon request, and, where a licensee demonstrates that it does not serve its assigned market, we will consider reducing the assigned fees to a more equitable level, based upon the area actually served by the licensee.").

⁷ 47 C.F.R. § 76.55(e)(2); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000) ("Fees for television stations are based on market size as determined by Nielsen. This is the only consistent source the Commission has for determining which market a station serves.").

The crux of a request to refund a regulatory fee at § 1.1160 is demonstrating either that an excessive fee has been paid or that the fee should be waived or reduced. As to the latter basis, in certain instances, payment of a regulatory fee may be waived, reduced, or deferred upon a showing of *good cause*⁸ and a finding that the *public interest will be served thereby*.⁹ The applicant has the burden of demonstrating relief is warranted,¹⁰ i.e., that special circumstances warrant a deviation from the general rule to collect the regulatory fee, and that the deviation will serve the public interest.¹¹

To initiate and complete the filing of such a request, an applicant must follow the Commission's procedures at 47 C.F.R. §§ 0.401, 1.7, and 1.1166 that establish the proper location for filing waiver, reduction, and refund requests and the consequence of dismissal for failing to comply with those rules.¹² The Commission has designated specific offices to receive and process certain matters, thus a request for relief is filed only upon receipt at the location designated by the Commission.¹³ As such, under 47 C.F.R. § 1.1166,¹⁴ a petition to waive or reduce a regulatory fee must be filed with the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554 by mailing or otherwise delivering a hard copy of the documents to Office of the Secretary.

Discussion

As we discuss below, we dismiss the *Request* because Licensee failed to comply with filing procedures, and, in the alternative, we deny the *Request* because Licensee failed to demonstrate it paid an excessive fee or that its situation warrants a waiver of the fee and a refund.

First, we dismiss the *Request* because Licensee's submission does not comply with Commission's filing procedures. For example, 47 C.F.R. §§ 0.401, 1.7, and 1.1166 establish the proper location for filing waiver and refund requests and the consequence of dismissal for failing to comply with those rules. The Commission has designated specific offices to receive and

⁸ 47 C.F.R. § 1.3.

⁹ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). See also Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5354 ¶ 65 (1994) (1994 *Report and Order*); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*); *Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26466, ¶ 5 (2003) (*Phoenix Broadcasting, Inc.*).

¹⁰ *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

¹¹ *Northeast Cellular*, 897 F.2d at 1166.

¹² 47 C.F.R. § 0.401 ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations set forth below will be returned to the applicant without processing. When an application or other filing does not involve the payment of a fee, the appropriate filing address or location is established elsewhere in the rules for the various types of submissions made to the Commission."), 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission").

¹³ *Id.*

¹⁴ 47 C.F.R. § 1.1166(a)(2) ("If no fee payment is submitted, the request [for waiver and deferral] should be filed with the Commission's Secretary.").

process certain matters, thus a request for relief is *filed* only upon receipt at the location designated by the Commission.¹⁵ Under 47 C.F.R. §§ 1.1160 and 1.1166,¹⁶ Licensee's request to reduce and refund the fee paid or to waive a portion of the regulatory fee must be *filed* with the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554 by mailing or otherwise delivering a hard copy of the documents to Office of the Secretary. Licensee did not deliver its *Request* to the Commission's Office of the Secretary, rather Licensee addressed and mailed it to the Office of the Managing Director at Room 1-A625, hence the *Request* was never filed, and it may be dismissed and returned unprocessed.¹⁷ Even so, as a matter of administrative economy, we look to merits of Licensee's *Request*, and, as we discuss next, in the alternative, deny.

The core of a request for a refund is establishing that applicant paid an excessive fee. Licensee, however, fails to establish that point.¹⁸ Indeed, Licensee's fee for a commercial television station is based upon the size of the Nielsen DMA,¹⁹ the fact and procedure for which Licensee neither disputes nor challenges as being erroneous. Rather, the essence of Licensee's *Request* is that a waiver of the determined fee amount is appropriate because the station, located outside the DMA cities, has a coverage area that is 54% of a CBS affiliated station in Schenectady, NY, it lacks network affiliation, it "should continue to be a UHF TV Band" station because "[f]or all intents and purposes, [the station's] operation and market is on channel 51," and the station has "only an estimated 53,385 television households within Berkshire County." In Licensee's view, under 1994 *MO&O*, 10 FCC Rcd at 12763, ¶¶ 21-22, these circumstances warrant reduction of the regulatory fee. As we discuss next, Licensee's reliance on the 1994 *MO&O* is misplaced because Licensee fails to demonstrate that the circumstances described as the grounds for relief in 1994 *MO&O* are valid now, that the characteristics enumerated in the 1994 *MO&O* apply to Licensee, and that Licensee's payment is excessive.

First, market conditions in the 1994 *MO&O* forming the basis for a reduction of the fee are enumerated necessary characteristics. In particular, applicants considered for relief "were generally UHF stations ... lack[ing] network affiliations ... located outside of the principle city's metropolitan area and do not provide a Grade B signal to a substantial portion of the market's metropolitan areas. Often these stations are not carried by cable systems serving the principal metropolitan areas."²⁰ To show whether a station "serve[s] the principal metropolitan areas within their assigned markets and serve[s]" a particular number of "television households ... [the

¹⁵ 47 C.F.R. § 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.").

¹⁶ 47 C.F.R. § 1.1166(a)(2).

¹⁷ 47 C.F.R. § 0.401.

¹⁸ Consistent with 47 C.F.R. § 1.1160(a)(1), we considered Licensee's entire submission.

¹⁹ 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.55(e)(2); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000); see FY 2001 Mass Media Regulatory Fees, *Public Notice* (Aug. 7, 2001); FY 2002 Media Services Regulatory Fees, *Public Notice* (Aug. 7, 2002), What You Owe-Media Services Licensees For FY 2013, *Regulatory Fees Fact Sheet* (Sep. 5, 2013), What You Owe-Media Services Licensees For FY 2014, *Regulatory Fees Fact Sheet* (Sep. 5, 2014) ("Fees for commercial television stations are based upon the size of the Nielsen Designated Market Area"), What You Owe-Media Services Licensees For FY 2015, *Regulatory Fees Fact Sheet* (Sep. 11, 2015) ("Fees for commercial television stations are based upon the size of the Nielsen Designated Market Area").

²⁰ 1994 *MO&O*, 10 FCC Rcd at 12763, ¶ 21.

applicant should present information] derived from the Arbitron market data in the Television and Cable Fact Book.”²¹

Over time, however, circumstances existing in 1995 changed. For example, major changes in 1996, 2000, and 2009, set out below, modify the characteristics. Hence, an applicant for relief now must consider and address those relevant changes or invite denial of the relief. Licensee’s *Request* fails to align its situation to the characteristics.

First, the Commission does not rely on Arbitron market data. In 1996, Arbitron market data was replaced by A.C. Nielsen ratings to determine which market a station serves,²² and thereafter “[f]ees for television stations are based on market size as determined by Nielsen.”²³ As to fee determinations, in 1996, the Commission said it would consider cases in which an applicant demonstrated it does not serve its assigned market; however, in 2000, the Commission noted that it “is unaware of the existence of any reliable published source that can identify which television stations are serving small markets at the fringe of larger DMA’s.”²⁴ Licensee must shoulder the heavy burden to establish that its circumstances fall within these defined limits and that the Nielsen ratings are wrong. The Nielsen rating standard is codified at 47 C.F.R. § 76.55(e)(2), which provides, “[e]ffective January 1, 2000, a commercial broadcast television station’s market, unless amended pursuant to § 76.59, shall be defined as its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.” Annual regulatory fees assessed on commercial television stations licensees are based upon the size of the Nielsen DMA.

Licensee does not establish that its signal does not extend to a substantial portion of the market’s metropolitan area.²⁵ Instead, Licensee points to a joint application to permit one licensee to own two full power television stations within one DMA, and to the city of Pittsfield, Massachusetts as the station location that is outside New York State. Licensee refers to the apparent size of the county; however, Licensee fails to include material information. For example, Licensee fails to acknowledge that the station is carried by cable and satellite

²¹ *Id.* at 12763, ¶ 22.

²² Assessment and Collection of Regulatory Fees for Fiscal Year 1996, *Report and Order*, 11 FCC Rcd 18774, 18786, ¶ 32 (1996) (“We ...rely on Nielsen’s DMA market rankings ... Nielsen data is generally accepted throughout the industry and will be updated and published annually ... We will consider the equities concerning the fees of licensees that change markets on a case-by-case basis, upon request, and, where a licensee demonstrates that it does not serve its assigned market, we will consider reducing the assigned fees to a more equitable level, based upon the area actually served by the licensee.”); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000) (Commission rejected commenter’s “argu[ment] that small television stations located near large designated market areas (DMA) are assessed disproportionately high fees because the A.C. Nielsen ratings include them in the DMA but they do not serve households in the DMA. Fees for television stations are based on market size as determined by Nielsen. This is the only consistent source the Commission has for determining which market a station serves.”).

²³ Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd at 14492, ¶ 34, *supra*.

²⁴ *Id.* at 14493.

²⁵ Indeed, Grade B contour information, mentioned in the 1994 MO&O, defines an *analog* television station’s service area, see 47 C.F.R. § 73.683(a), which does not apply after June 12, 2009, the date by which stations transitioned to digital television, hence it is not relevant.

providers²⁶ Comcast, Dish Network, DirecTV, Time Warner Cable, and Verizon FiOS that deliver the station's signal to Albany, Queensbury, Great Barrington, Catskills, and Bennington,²⁷ it operates on digital station channel 13,²⁸ its 36 dBu Service Contour length is 361 miles including Albany, Troy, Schenectady, Rotterdam in NY,²⁹ a distance of about 42 miles from Pittsfield, MA, it is affiliated with MyNetwork TV,³⁰ and its fee is based on the market size determined by the Nielsen ratings. Without a discussion of these differences, Licensee is unable to match its circumstances with either those described in the 1994 MO&O or with the criteria of the changed market and strength standards. There is little if any match between the characteristics described in 1994 MO&O³¹ with Licensee's station. Moreover, Licensee's assertion that the station "covers 25,867 square kilometers of the Albany-Schenectady-Troy DMA" without providing a rational context to the claim does not establish that the Nielsen rating information is incorrect. Indeed, assessing the assertion in a light favorable to Licensee, we may conclude that the offered area relates to a circle having a radius of approximately 70 miles, a distance that more than reaches 42 miles from Pittsfield, MA to the city of Schenectady, NY that is more distant from Pittsfield than Troy or Albany.³² Licensee's assertion that the station's "operation and market identification" is not material to the cable and satellite delivery systems and not a reason to include that the channel should be construed as having UHF characteristics. Finally, Licensee's Attachment C shows the "Total Cable/ADS³³ Penetration of 93%." This exhibit rebuts the conclusion from Licensee's calculation of the "persons per television household" that its market is equivalent to a smaller DMA. Hence, rather than showing reduced coverage, Licensee demonstrates its signal reaches nearly the entire DMA. As such, Licensee fails to meet the threshold requirement in 1994 MO&O to obtain review by the Office of the Managing Director. Finally, Licensee fails to show that the fee determined from Nielsen ratings is incorrect. The whole of Licensee's *Request* fails to demonstrate the fee paid is excessive.

Finally, even if we construe Licensee's *Request* as seeking a waiver under 47 C.F.R. §1.1166, Licensee fails to establish for a waiver both *good cause*³⁴ and a finding that the *public interest will be served thereby*.³⁵ Accordingly, we deny the *Request*.

²⁶ See fn 27, below.

²⁷ See Attachment C; <http://tvlistings.aol.com/listings/ny/schenectady/time-warner-cable/NY31587>; <http://tvlistings.aol.com/listings/ny/albany/time-warner-cable/NY31597>; <http://tvlistings.aol.com/listings/ny/troy/time-warner-cable/NY31579%7CX>; <http://www.satellitetelevision.com/dish-tv/new-york/c/catskill/>; <http://www.mhcable.net/services/cable-tv/#Channels>.

²⁸ https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/eng_tv.pl?Facility_id=136751.

²⁹ <http://www.bing.com/maps/?mapurl=https://transition.fcc.gov/fcc-bin/contourplot.kml?gmap=2%26appid=1316983%26call=WNYA%26freq=0.0%26contour=36%26city=PITTSFIE LD%26state=MA.kml&ignoreoptin=1>.

³⁰ <http://www.bizjournals.com/albany/stories/2006/03/06/daily48.html> ("WNYA/Channel 15, the UPN Network affiliate in Albany, N.Y., has signed an affiliation agreement with MyNetworkTV, the new primetime programming service from Fox Television.").

³¹ 1994 MO&O, 10 FCC Rcd at 12763, ¶ 21.

³² Straight line distance between Pittsfield, MA and the cities of Troy and Albany, NY is approximately 30 miles, each.

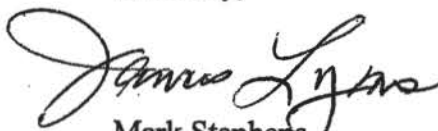
³³ ADS means alternate deliver systems, e.g., satellite, satellite master antenna systems, or multipoint distribution systems.

³⁴ 47 C.F.R. § 1.3.

³⁵ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166. See also 1994 Report and Order, 9 FCC Rcd at 5354, ¶ 65; *WAIT Radio v. FCC*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

If you have any questions concerning this matter, please contact the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Stephens", written in a cursive style.

For: Mark Stephens
Chief Financial Officer